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AV ASIA SDN BHD

v.

PENGARAH KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[ORIGINATING SUMMONS NO: 24NCC(ARB)-1-01-2013]
25 FEBRUARY 2013

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ARBITRATION: *Agreement - Jurisdiction of court - Whether court could intervene - Whether court provided with jurisdiction to intervene - Whether court had power to entertain application - Arbitration Act 2005, ss. 8 & 12*

As provided for in an agreement between the second defendant
D ('Measat') and the plaintiff, the former referred its dispute with the plaintiff to the Kuala Lumpur Regional Centre for Arbitration ('KLRCA'). In its notice of arbitration to the plaintiff, Measat pointed out that the KLRCA Rules of Arbitration 2012 ('KLRCA Rules') required three arbitrators to be appointed. The plaintiff disagreed and
E said that if the KLRCA Rules are read together with s. 12(2) of the Arbitration Act 2005 ('the Act'), only one arbitrator is required and it informed the Director of KLRCA accordingly. Measat countered by saying that as the arbitration clause in the agreement between the parties provided for the KLRCA Rules to govern the arbitration, the Act had no application to the matter. The plaintiff applied to the court to resolve
F the deadlock but Measat argued that the court had no jurisdiction to intervene by virtue of ss. 2(2)(c), 8 and 18 of the Act.

Held (dismissing application):

G **(1)** The court had to decline jurisdiction to hear the matter. Section 8 of the Act clearly stated that 'unless otherwise provided, no court shall intervene in any of the matters governed by the Act'. (paras 10 & 17)

(2) The matter concerning the number of arbitrators was clearly
H provided for and governed by the Act. The court therefore had no power to entertain the instant application. Nowhere in s. 12, Chapter 3 or Part II of the Act could it be said the court had power to intervene. The Parliament had legislated that where such matters as this arose it was to be dealt with under s. 18 of the Act

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which provided that 'the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement'. Section 18(8) allowed a party to appeal to the High Court after the arbitral tribunal had made a preliminary ruling on the matter. (paras 15 & 17)

(3) The terms of s. 8 were intentional and deliberate and reflected the policy and general principle of non-intervention; respecting party autonomy and protecting parties who had chosen arbitration from unnecessary delay and expense. Throughout the Arbitration Act there were clear provisions as to when and where the court had jurisdiction; that the nature of the court's jurisdiction depended on what or when the matter was brought before the court. (paras 11 & 14)

Case(s) referred to:

Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147 ***(refd)***

Bremer Vulkan v. South India Shipping Corp [1981] 1 All ER 289 ***(refd)***

Itochu Corporation v. Johann MK Blumenthal GmbH & Co [2012] EWCA 996 ***(refd)***

Klockner Industries-Anlagen GMBH v. Kien Tat Sdn Bhd & Anor [1990] 1 LNS 70 HC ***(refd)***

R v. National Joint Council for the Craft of Dental Technicians [1953] 1 QB 704 ***(refd)***

Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors [1998] 3 CLJ 275 CA ***(refd)***

Soilchem Sdn Bhd v. Standard-Elektrik Lorenz AG [1992] 1 LNS 51 HC ***(refd)***

YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 2(2)(c), 3(4), 8, 12(2), 13(5), 15(5), 18(8)

Arbitration Act 1996 [UK], ss. 15, 18

For the plaintiff - Malik Imtiaz (RS Sodhi & Pavendeep Singh with him); M/s Watson Peters & Mohd Fuad

For the 2nd defendant - Cecil Abraham (Nantha Balan & Wong Wye Wah with him); M/s Kadir Andri & Partners

Reported by Ashok Kumar

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JUDGMENT

Mary Lim J:

Background facts

B **[1]** A dispute arose between the plaintiff and the second defendant relating to an alleged breach of a mutual non-disclosure agreement dated 1 August 2008 ('MNDA') made between the parties. Clause 21 of the MNDA provides for a resolution of the dispute:

C > This NDA shall be governed by the laws of Malaysia and all disputes arising out of this NDA shall be resolved by arbitration at the Kuala Lumpur Regional Centre for Arbitration in accordance with the Rules of Arbitration of the Regional Centre for Arbitration Kuala Lumpur.

[2] The second defendant initiated arbitration and towards that end, D issued a notice of arbitration dated 23 October 2012. In that notice issued pursuant to r. 2 of part 1 of the KLRCA Rules of Arbitration 2012, the second defendant *inter alia* stated that pursuant to art. 7(1) of the KLRCA Rules 2012, three arbitrators shall be appointed. In that same notice, the second defendant made its nomination and requested that the plaintiff "appoints its arbitrator within 30 days from the date of E this notice of arbitration".

[3] In its response to notice of arbitration pursuant to art. 4 of Part II of the KLRCA Arbitration Rules 2012 and the Arbitration Act 2005, the plaintiff stated that on the appointment of arbitrators, "Pursuant to F art. 1(3) of the KLRCA Rules read together with s. 12(2) of the Arbitration Act 2005 one arbitrator shall be appointed. The claimant does not agree that the arbitral tribunal shall consist of three arbitrators. The respondent request that pursuant to s. 13(5) of the Arbitration Act 2005 a single arbitrator be appointed". The plaintiff did not nominate any arbitrator.

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[4] By letter dated 9 November 2012, the plaintiff informed the director of KLRCA that it "does not agree that three arbitrators be appointed in this arbitration". It also informed the director that "pursuant to s. 12 of the Arbitration Act 2005 ('the Act') where the parties fail to H determine the number of arbitrators the arbitral tribunal shall in the case of a domestic arbitration consist of a single arbitrator". An extension of one month to respond to the notice of arbitration was then sought. The letter was copied to the second defendant.

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[5] The second defendant responded with its disagreement with the plaintiff's "proposal that a single arbitrator be appointed" - see letter dated 20 November 2012 to the director of KLRCA which was copied to the plaintiff. The second defendant stated that since the "parties had agreed, *vide* cl. 21 of the mutual non disclosure agreement (MNDA), that all disputes arising out of the MNDA shall be resolved by arbitration in accordance with the Rules of Arbitration of the Regional Centre for Arbitration Kuala Lumpur", therefore "the KLRCA Rules 2012 apply and s. 12 of the Arbitration Act 2005 has no application here". According to the second defendant, there was "no agreement between the parties that the arbitral tribunal was to comprise a single arbitrator". It then reiterated its stand that "three arbitrators should be appointed, in accordance with art. 7(1) of Part II of the KLRCA Rules 2012."

[6] This is what art. 1(3) of Part II of the KLRCA Rules say:

> These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

[7] This is what is provided in s. 12 of the Arbitration Act 2005 (Act 646):

> 12. Number of arbitrators
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> (1) The parties are free to determine the number of arbitrators.
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> (2) Where the parties fail to determine the number of arbitrators, the arbitral tribunal shall:
>
> (a) in the case of an international arbitration, consist of three arbitrators; and
>
> (b) in the case of a domestic arbitration, consist of a single arbitrator.

[8] It is not in dispute that the arbitration is a domestic arbitration. The arbitration agreement is found in cl. 21 of the MNDA. It can safely be said that the parties are not in agreement on the number of arbitrators. That being so, the plaintiff argues that in view of art. 1(3) of Part II of the KLRCA Rules read together with s. 12 of the Arbitration Act 2005 (Act 646), the arbitral tribunal must necessarily comprise a single arbitrator. The plaintiff argued that s. 12, more particularly para. (2)(b) is a provision that the parties cannot derogate from, in which case this paragraph will prevail and the number of arbitrators to be appointed is necessarily, one.

[9] In opposing this application, the second defendant first takes the issue of this court's jurisdiction to entertain the application. It submitted that the court lacks jurisdiction by virtue of several provisions of Act 646, namely ss. 2(2)(c), 8 and 18 of Act 646.

[10] In my view, the second defendant is correct. The intention of Parliament in relation to the object of Act 646 is evident in the opening long title of the Act. It is an Act "to reform the law relating to domestic arbitration, provided for international arbitration, the recognition and enforcement of awards and for related matters". From its structure, it is quite evident that the role of the court has been spelled out early in s. 8 which provides that:

> Unless otherwise provided, no Court shall intervene in any of the matters governed by this Act.

[11] This is intentional and deliberate. This reflects the policy and general principle of non-intervention; respecting party autonomy, and protecting parties who have chosen arbitration from unnecessary delay and expense. This provision shows support for arbitration. The terms of the provision indicate that unlike other matters where the court assumes jurisdiction, and then there may be provisions attempting to oust that jurisdiction; here, there is no jurisdiction to intervene in matters governed by the act "unless otherwise provided". In other words, consistent with the principle accorded by many jurisdictions around the globe, that in arbitration and matters relating to arbitration, the courts have a healthy respect for party autonomy or party choice on dispute resolution. It is not lip service but a real conscious approach as can be seen from the decisions of our apex court. In fact, the act is filled with the phrase "unless otherwise agreed by the parties". It is used no less than 20 times throughout the legislation. This is quite apart from other words which may arguably draw the same conclusion; words or terms such as "the parties are free to" or "the parties may agree".

[12] Actually, from as early as s. 3(4), the parties to arbitration are given a choice as to the application of Part III of the Act; and that choice extends even to whether that application is in whole or in part. Part III concerns "additional provisions relating to arbitration" and it relates to matters such as consolidation of proceedings and concurrent hearings; determination of preliminary point of law by court; reference of questions of law; appeal; costs and expenses of an arbitration; extensions of time for commencing arbitration proceedings and award.

[13] The Court of Appeal in *Sarawak Shell Bhd v. PPES Oil & Gas Sdn Bhd & Ors* [1998] 3 CLJ 275; [1998] 2 MLJ 20, 25, after examining the two decisions of *Klockner Industries-Anlagen GMBH v. Kien Tat Sdn Bhd & Anor* [1990] 1 LNS 70; [1990] 3 MLJ 183 and *Soilchem Sdn Bhd v. Standard-Elektrik Lorenz AG* [1992] 1 LNS 51; [1993] 3 MLJ 68, has also reminded that in matters concerning arbitration, and for "the avoidance of doubt, we now categorically say that these two decisions should not be understood to have left open the possibility that the court has some other power to intermeddle in the arbitrations at the centre whether by way of inherent jurisdiction or at common law or otherwise". In short, in matters concerning arbitration, the supervisory jurisdiction of the court is not inherent in character as a court of justice, but it is statutory - see Lord Diplock's discussion on this in *Bremer Vulkan v. South India Shipping Corp* [1981] 1 All ER 289 at pp. 295 to 296. Central to the court's reasoning is the irrefutable status of a private arbitration agreement. Quoting from Lord Goddard in *R v. National Joint Council for the Craft of Dental Technicians* [1953] 1 QB 704, a private arbitrator is in "one sense ... the antithesis of a court. A person goes to arbitration because he does not want to go to court".

[14] Although this decision was made under the old law, the Arbitration Act of 1952, the position is clearer under Act 646 and may be said to be even stronger with the uncompromising terms found in s. 8 of Act 646. Throughout the legislation, there are clear provisions as to when and where the court has jurisdiction. This is not changed merely by the plaintiff's manner of or reasons for the challenge. Within Act 646, it can be seen that the nature of the court's jurisdiction depends on what or when the matter is brought before the court. For example, there are instances where the matter ends at the High Court. See s. 15(5).

[15] Bearing in mind the clear mandates in s. 8 which guides the court in the intervention sought here, nowhere in s. 12, Chapter 3 or Part II of Act 646, can it be said that there is power to intervene. In the absence of such power, s. 8 has clearly provided that the court shall not "intervene in any of the matters governed by this Act." The matter concerning the number of arbitrators is one clearly provided under this Act and is therefore thereby governed by it. That being so, the court has no power to entertain the present application.

[16] Learned counsel for the plaintiff agrees that the arbitral tribunal has jurisdiction to deal with the very issue now posed before the court. However, the argument is that the plaintiff ought not to be unnecessarily expensed to deal with the issue before the arbitral tribunal. The court has jurisdiction and ought therefore to answer the question posed.

[17] In my view, bearing in mind the clear terms of s. 8, the court must decline jurisdiction. In fact, as discussed earlier, the court has no jurisdiction since none have been given under s. 12. Parliament has legislated that where such matters arises, it is to be dealt with under s. 18 which provides that "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." Section 18(8) allows a party to appeal to the High Court when the arbitral tribunal has made a preliminary ruling on the matter. This is consistent with the principle of *kompetenz - kompetenz* - Otherwise, there will be no meaning or purpose in ss. 8 and 18.

[18] After close of submissions and I had reserved decision, three authorities were cited to me by letter from the plaintiff. The letter was copied to all parties.

[19] Having examined these decisions, with respect, these decisions do not alter my conclusions. The case of *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 and *YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471 are of general application and must be considered in the light of specific legislation and private arbitration arrangements. Those cases concern decisions of public authorities. As for the case of *Itochu Corporation v. Johann MK Blumenthal GmbH & Co* [2012] EWCA 996, the English Court of Appeal was there dealing with ss. 15 and 18 of the English Arbitration Act 1996. Quite apart from the fact that the terms of the arbitration agreement were quite different from the arbitration agreement here, there was no consideration of an equivalent s. 8.

[20] Insofar as the application of the Specific Relief Act 1950 (Act 137) is concerned, which is not in fact invoked as evidenced from the intitulement, the court is said to have jurisdiction. With respect, the court must disagree. The Specific Relief Act 1950 is general law on remedies available whereas the Arbitration Act is specific law on arbitration. The maxim *generalibus specialia derogant* applies.

[21] For all the reasons expressed, this court will therefore decline jurisdiction. The application is dismissed with costs agreed between the parties, that is, a sum of RM15,000.